In the District Court of the United States for the Eastern District of New York

CIVIL NO. 7097

THE MOTOR HAULAGE COMPANY, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] dated January 20, 1947, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. Appeal was allowed on March 10, 1947, and appeal papers were served on March 14, 1947.

The Commission's order, dated January 7, 1946, granted appellant operating authority under the "grandfather clause" of Section 209 (a) of Part II of the Interstate Commerce Act as amended (49 U. S. C. 309 (a)) as a contract carrier by

[1] The court also rendered an opinion on the same date.

motor vehicle, but imposed certain restrictions and granted less extensive authority than appellant had applied for.[2]

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[2] The authority granted to appellant (46 M. C. C. 127) was as follows:

(1) General commodities, except livestock, commodities in bulk, dangerous explosives, and household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467.

Between points in the New York Commercial zone as defined in *New York, N. Y., Commercial Zone*, 1 M. C. C. 665, and those in New Jersey within 10 miles of Jersey City, N. J., on the one hand, and, on the other, points in Connecticut, New Jersey, and New York within 40 miles of Columbus Circle, New York, N. Y.

Limited to a service wherein motor vehicles, accompanied by drivers employed by applicant and who operate such vehicles, are assigned to shippers under continuing contracts, for the exclusive use of such shippers in transporting such shippers' property.

(2) Malt beverages, from New York, N. Y., to points in Atlantic, Mercer, Middlesex, Monmouth, Morris, and Somerset Counties, N. J., and Fairfield County, Conn., returning with rejected shipments and empty malt beverage containers.

(3) Telephone directories, between Jersey City, N. J., on the one hand and, on the other, points in Nassau, Suffolk, Rockland, ad Westchester Counties, N. Y., and Fairfield County, Conn.

(4) Illuminated car signs, from New York, N. Y., to Berwick, Pa., and return of damaged or rejected shipments.

(5) Damaged airplanes, from points in Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and the District of Columbia, within 250 miles of Columbus Circle, New York, N. Y., to points on Long Island, N. Y.

The authority granted herein shall not be construed as authorizing duplicate operations which are severable in any respect.

Appellant's assignments of error and jurisdictional statement disclose that this appeal raises only two questions:

(1) Whether it was error for the Commission to hold that the appellant was engaging in transportation as a contract carrier for which a permit from the Commission was required when it engaged in operations[3] under an arrangement whereby appellant furnished to shippers the necessary vehicles, equipment, and drivers, as well as other servicing, for which appellant is subsequently reimbursed by the shipper.

(2) Whether it was error for the Commission to impose the condition limiting appellant's operations as a carrier of general commodities "to a service wherein motor vehicles, accompanied by drivers employed by applicant and who operate such vehicles, are assigned to shippers under continuing contracts, for the exclusive use of such shippers in transporting such shipper's property."

It is submitted that the appeal presents no substantial question and that the decree of the

[3] Described by appellant as operations under so-called "contracts of rental without responsibility." These operations differ from appellant's service under contracts of "rental with responsibility," which appellant concedes is carriage subject to Commission regulation, in that the contracts of "rental without responsibility" contain language stating that appellant shall not be held responsible for loss or damage to the property transported, 46 M. C. C. at 117; typewritten Jurisdictional Statement, p. 5.

district court should be affirmed without argument.

Appellant's contention that, because it is not a "bailee" of the property transported, it is not a contract carrier engaged in transportation subject to regulation by the Commission, is without substance. The question here is one of statutory interpretation and not one to be determined by the "witty diversities" governing the common law concept of bailment; whether a party falls within the category of "contract carrier" created by statute cannot depend upon criteria derived from inquiry into characteristics of a common carrier at common law. *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *Contracts of Contract Carriers*, 1 M. C. C. 628, 632; *Cornell Steamboat Company* v. *United States*, 321 U. S. 634, 637; *Champlin Refining Co.* v. *United States*, No. 21, October Term 1946, decided November 18, 1946. The mere fact that "by grace of contract nomenclature" appellant undertakes to relieve itself from responsibility by inserting language in its agreements to the effect that it should not be a bailee is not a circumstance conclusive as to its carrier status. *Thomson* v. *United States*, 321 U. S. 19, 25.

Notwithstanding the verbal protestations inserted by appellant in its contracts, the transportation operations themselves are clearly conducted

under appellant's control and responsibility. Besides furnishing the trucks, appellant provides for the maintenance, repairs, garage facilities, and fuel needed in connection with the vehicles supplied. Appellant also furnishes the drivers and helpers required to operate the trucks. Such drivers and helpers are and remain appellant's employees. They are carried on appellant's pay roll and appellant pays their wages, compensation insurance, bonding fees, and social security taxes. Appellant, moreover, carries personal injury and property damage insurance covering these motor carrier operations. Appellant is the party liable to the general public for tort claims arising in connection with the transportation.'

What constitutes transportation is an administrative question for determination by the Commission. *Wabash R. R. Co. v. United States,* 321 U. S. 403, 407–8. In a situation such as that involved in the case at bar, the issue whether the transportation operation performed is that of the shipper as a private carrier or that of the appellant as a contract carrier depends upon a determination of the question as to who has, in fact,

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'Typewritten Jurisdictional Statement, pp. 5–6; 46 M. C. C. at 116–7. Appellant is reimbursed for the wages, compensation insurance, social security taxes, and bonding fees of the employees, and receives in addition a charge of one percent.

control and responsibility for the operation. This question must be determined by the Commission upon consideration of the particular facts of each case, in the light of all the conditions and circumstances surrounding the operation. When the party thus ascertained by the Commission to have control and direction of the operation has been determined, it follows that such party must be deemed to be the "carrier" under the Act. *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 54.

The fact that the question may be a difficult or troublesome one does not detract from the Commission's authority to decide it. Many administrative questions must be determined as the result of judicious and painstaking evaluation of conflicting considerations, doubtful indicia, and slight differences of degree; just as is often the case with problems for judicial determination, even with respect to issues of constitutional law. *Nash* v. *United States*, 229 U. S. 373, 377. It may not be easy to determine whether the functions performed by appellant amount to transportation, when certain circumstances point to its control of the operation and other circumstances emphasize the part played by the shipper in routing the traffic. But to some extent, even a common carrier is subject to the shipper's direction and control with respect to the nature, volume, routing, and desti-

nation of shipments. Nevertheless, this does not mean that the common carrier abandons its status as such. Similarly, although the mere rental of equipment does not make the lessor a contract carrier, it is obvious that when there are other added circumstances pointing toward carrier status, a point must somewhere be reached where it can be ascertained that the extent of the service furnished is such as to justify the conclusion that the party performing such functions is the party responsible for the control and conduct of the transportation operation, not only to the other party to the contract but also to the general public. Such a determination with respect to appellant's carrier status has been duly made by the Commission in the present case.

Appellant's second contention, challenging the conditions imposed by the Commission in its order, is equally unsound. Appellant there complains of the limitations that appellant "may transport general commodities only in motor vehicles assigned 'for the exclusive use of such shippers in transporting such shippers' property,' and only 'under continuing contracts.'"[5]

It seems plain that these limitations were properly imposed by the Commission, since the appellant was seeking a permit under the "grandfather clause," and it was therefore the duty of

[5] Typewritten Jurisdictional Statement, p. 7.

the Commission to "specify in the permit the business of the contract carrier covered thereby and the scope thereof," as it existed during the "grandfather" period (Section 209 (b), 49 U. S. C. (b)). Consequently, if the type of service offered by appellant during the "grandfather" period was a service affording each shipper, under special and individual contracts, exclusive use of the vehicles furnished (and the Commission so found, 46 M. C. C. 124), it would have been improper for the Commission to have granted a "grandfather" permit covering some different type of service. *Noble* v. *United States,* 319 U. S. 88, 92; *Crescent Express Line* v. *United States,* 320 U. S. 401, 407–9; *Royal Cadillac Service, Inc.* v. *United States,* 52 F. Supp. 225 (S. D. N. Y., 1942), aff'd., 317 U. S. 595.

In the *Crescent* case a limitation was upheld which prevented the substitution of bus service between terminals for door-to-door service "from your home to your hotel" which the applicant had advertised and performed during the "grandfather" period. The limitation to six passengers in one vehicle, which was sustained in the *Crescent* case, is quite similar to the limitation imposed upon the appellant in the case at bar, requiring that service be furnished to only one shipper in one vehicle. If, in the *Crescent* case,

the record had shown that during the "grandfather" period the applicant had transported in his sedans only one passenger per trip enjoying exclusive occupancy of the vehicle, instead of up to six passengers, it is clear that a limitation recognizing the type of service actually furnished would have been upheld. If, as appellant emphasizes in other connections, the transportation service furnished by it was intended to be equivalent to that which a shipper could have obtained by operating its own equipment, it is clear that the service furnished by appellant during the "grandfather" period contemplated a continuing arrangement providing for individual rather than joint use by shippers of the motor vehicles furnished.

Consequently, the Commission in incorporating these limitations in the "grandfather" permit granted to appellant, merely gave proper recognition to the distinctive character of the type of service which appellant furnished to shippers during the "grandfather" period. By placing a commensurate limitation in the permit, the Commission accorded in full measure the "substantial parity" between future operations and prior bona fide operations to which appellant was entitled.

For the foregoing reasons, it is clear that this appeal presents no substantial questions. It is

therefore, respectfully submitted that the judgment of the District Court should be affirmed.

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MARCH 1947.

I certify that a copy of the foregoing Motion to Affirm was this day mailed to counsel for appellant.

This 28th day of March 1947.

Edward Dumbauld,
EDWARD DUMBAULD,
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1947